Supreme Court, U. S.
FILED
MAR 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-607

GEORGE HENSON MIREE, CLAUDE ESTES MIREE and DOROTHY ESTES MIREE, Minors, by and Through AUBREY S. MIREE, JR., and CLAUDE H. ESTES, JR., Co-Guardians of Said Minors,
Petitioners,

versus

DEKALB COUNTY, GEORGIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Miree v. United States*, 526 F. 2d 679 (1976). The en banc opinion, reversing the panel majority opinion in part, is reported at 538 F. 2d 643 (1976).

GROUNDS UPON WHICH JURISDICTION IS INVOKED

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals from which review is sought was rendered on August 25, 1976. Petition for certiorari was timely filed on October 30, 1976 and such petition was granted by the Court on January 17, 1977.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The Rules of Decision Act (Section 34 of the Judiciary Act of 1789)

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(1 Stat. 92; 28 U.S.C. § 1652)

Airport and Airway Development Act of 1970, Section 18 [In Part]

As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—

* * * * * * * *

(3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

(84 Stat. 219; 49 U.S.C. § 1718)

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether federal common law governs rights of intended third-party beneficiaries to a contract between the United States and a Georgia County for development and operation of an airport in commerce; and whether federal common law permits suits by such beneficiaries against the County for deaths caused by the County's breach of safety provisions contained in such contract.

2. Whether the County, by operating an airport in the federally preempted sphere of interstate air commerce, loses its

state-law immunity from suit for its own negligent and wanton misconduct.

3. Whether a civil remedy exists under the federal aviation acts for death or injury caused by flagrant breach of statutory safety standards in such acts.

4. Whether a United States District Court, sitting in diversity, can dismiss claims of plaintiffs who have standing to sue as third-party beneficiaries under the law of the forum state, by applying a more restrictive federal common law test for third-party beneficiary standing.

STATEMENT OF THE CASE

Petitioners are the three minor children of Mr. and Mrs. Richardson F. Miree. Their father and mother were passengers in a jet airplane which crashed shortly after take-off from the DeKalb-Peachtree Airport, in DeKalb County, near Atlanta, Georgia, on February 26, 1973. The parents were both killed, and the three minor children sue by their guardians. The cause of the crash was the ingestion of birds into the plane's jet engines as the plane cleared the end of the runway at take-off. Large flocks of birds were at the site, having been attracted by a garbage dump on the airport property immediately adjacent to the runway. The airport, including both the aviation facilities and the garbage dump, was owned and operated by DeKalb County.

The Miree children sued DeKalb County, as well as the corporate owners of the aircraft, and sued the United States, as the regulator of safety in all air travel and as operator of the control tower at the airport. A final order of the District Court dismissed the County on its pretrial motion to dismiss, on account of supposed governmental immunity from suit. (Appendix to Petition for Certiorari, A-32, A-37). [The two orders of the

District Court, and the two opinions of the Court of Appeals were an appendix to our Petition for Certiorari and are not recopied into the Appendix here. Rather, they are cited herein as "A.P.C. . . . ." References to the printed appendix are cited herein as "A. . . . ."]. The United States had filed cross-claims against the County, and those have not been dismissed.

The complaint (A. 9) sets forth facts supporting liability of the County on several grounds. Facts amounting to maintenance of a nuisance are alleged; negligence and wanton misconduct in permitting the garbage dump and its birds to remain near a jet runway are shown; misconduct in allowing a jet aircraft to take off at this particular time when flocks of birds were known to be in the area of the runway is shown; and it is pleaded (A. 19) that maintenance of the garbage dump is in direct violation of a written contract ("grant agreement") between the County and the United States, of which contract these users of the airport were intended third-party beneficiaries. The grant agreement was authorized by Georgia's Uniform Airport Act (Ga. Code Section 11-204 *Et Seq.*).

The contract between the Federal Aviation Agency and DeKalb County ("the grant agreement") was exhibited to the petitioners' complaint (A. 26), and the following specific provisions in the contract were further pleaded in the body of the complaint (A. 18) in support of our position that the petitioners are shown by its terms to have been intended beneficiaries of the contract:

> "The Sponsor will operate the Airport as such *for the use and benefit of the public*. . . . That the Sponsor may prohibit or limit any given type, kind or class of aeronautical use of the Airport if such action is necessary for the *safe operation of the Airport or necessary to serve the civil aviation needs of the public*." (Project Application, Sponsor's Assurances, Paragraph 2). (Emphasis added).

and

"The Sponsor will operate and maintain in *a safe and serviceable condition* the Airport and all facilities thereon and connected therewith which are necessary *to serve the aeronautical users of the Airport* other than facilities owned or controlled by the United States, and *will not permit any activity thereon which would interfere with its use for airport purposes.*" (Project Application, Sponsor's Assurances, Paragraph 6). (Emphasis added).

and

"In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, in any portion of a runway approach area in which the Sponsor has acquired, or may hereafter acquire, property interests permitting it to so control the use made of the surface of the land." (Project Application, Sponsor's Assurances, Paragraph 7).

and

". . . The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport." (Project Application, Sponsor's Assurances, Paragraph 12).

and

"Insofar as is within its power and to the extent reasonable, *the Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft.*" (Project Application, Sponsor's Assurances, Paragraph 13). (Emphasis added). (A. 19).

Moreover, the fact of the County allowing the garbage dump and the associated bird hazard to continue, with full knowledge of the hazard to jet aircraft, and the continued allowing of jet aircraft traffic during a time when flocks of birds were known to be present, and known to be attracted by reason of the County's own open garbage dump on property owned by the County adjacent to the runway, are allegations of fact supporting a finding of wilful and wanton misconduct by the County.

Such conduct by the County clearly violated the Airport and Airway Development Act of 1970, 84 Stat. 219, 49 U.S.C. §1701 et seq., pursuant to which the above quoted "Sponsor's Assurances" were made. The statute requires, at 49 U.S.C. §1718, assurances which include:

> (3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;
>
> (4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

The Complaint, at ¶28 (A. 21) alleges that "The maintenance of said garbage dump at said DeKalb-Peachtree Airport constituted an airport hazard as defined in 49 U.S.C. 1101, 49 U.S.C. 1711, and was a violation of 49 U.S.C. 1110(3) and 49 U.S.C. 1718(3)."

The facts alleged further supported a conclusion that the County, by engaging in the business of running a full-service commercial airport facility, was engaged in a proprietary function in a federal sphere of activity in interstate commerce which

resulted in an effective loss of any immunity from suit. This was averred in detail in an amendment to the Complaint (A-67, 68).

Upon the District Court granting the motion of the County to dismiss (orders of June 27, 1974 and September 25, 1974, A.P.C. 37 and A.P.C. 32, respectively) the Miree plaintiffs took an appeal to the United States Court of Appeals for the Fifth Circuit.

That appeal was heard by a panel of Judges Morgan, Godbold, and Dyer. Judge Morgan (himself a Georgia lawyer and former U.S. District Judge in Georgia) wrote the opinion of the panel, for himself and Judge Godbold (A.P.C. 16). The decision is reported in 526 F. 2d 679 (1976). Judge Dyer dissented. The majority opinion, while finding that plaintiffs' negligence and nuisance claims were barred by the County's tort immunity, held that the plaintiffs had stated a claim as third-party beneficiaries of the contract between the Federal Aviation Administration and DeKalb County, citing Georgia's statutory and case law as applicable, which holds that counties are not immune from suit on contracts, including suits by intended third-party beneficiaries. Judge Dyer's dissent (A.P.C. 27) contended that because the contract in question was entered pursuant to federal statute, and because the United States was a party, federal law must control its interpretation. He contended that under federal common law, the contract would have to manifest not only an intent to benefit the plaintiffs (which is the requirement of Georgia law, clearly met by the language of the grant agreement) but also must manifest expressly an intent to compensate them in the event of its breach.

After publication of the panel opinion, the Court of Appeals granted rehearing en banc on motion of the County. Its opinion (A.P.C. 1) is reported at 538 F. 2d 643 (1976). Of the thirteen memebsr of the en banc Court, seven adopted as the opinion of the Court, *per curiam*, Judge Dyer's dissent from the panel

opinion. One further member of the Court concurred (A.P.C. 3). Five members of the Court, including Chief Judge Brown, dissented in an opinion by Judge Morgan (A.P.C. 3); and the Chief Judge also dissented separately (A.P.C. 13).

SUMMARY OF ARGUMENT

The *Miree* Petition for Certiorari presented four bases for permitting an action against defendant DeKalb County, Georgia. Two of these were considered by the Court of Appeals and found substantial support in dissents from the en banc opinion. Two were argued below but were not mentioned in the Court of Appeals opinions. A favorable ruling here on any of the four issues would allow the surviving Miree children to sue DeKalb County, Georgia. The Court here could either: (1) find that a federal common law third-party beneficiary rule permits suit by intended third-party beneficiaries of the contract between the United States and the County. This was Chief Judge Brown's position in his separate dissent; or (2) find that the County waived immunity by entering the federally preempted sphere of interstate air commerce; or (3) acknowledge an implied civil remedy for death or injury caused by flagrant breach of federal statutory aviation safety standards; or (4) find that the Georgia third-party beneficiary rule, permitting the action, applies in this diversity case. The latter was the position taken by four other dissenting members of the en banc Court of Appeals. The balance of this summary will state the petitioners' argument on these four bases for liability.

1. **Federal Common Law Permits Suits by Intended Third-Party Beneficiaries of Contracts, and Is Applicable Here Because the United States Was a Party to the Contract, Is a Party to the Lawsuit, and Important Federal Interests Are Served by Application of a Federal Rule Permitting Such Actions.**

The grant agreement executed between the United States and DeKalb County, Georgia (A. 26), which is the contract sued upon here, contains as its first substantive statement at Part III, Sponsor's Assurances, ¶2, the following language:

> The Sponsor [County] will operate the Airport as such for the use and benefit of the public . . . to serve the civil aviation needs of the public. (A. 36)

The federal cases which have considered standing of third-party beneficiaries to sue on contracts to which the United States is a party clearly allow actions by intended third-party beneficiaries. In failing to recognize that, the Court of Appeals for the Fifth Circuit here ignored its own decision in *Bossier Parish School Board v. Lemon*, 370 F. 2d 847 (5th Cir. 1967), an opinion by Judge Wisdom, joined by present Chief Judge Brown, and by Chief Justice Burger, then sitting from the District of Columbia Circuit. In that case the Department of Health, Education and Welfare gave money to the county school board in exchange for assurances that children from a federal base would be admitted to the school. The Court held:

> Defendants by their contractual assurances have afforded rights to these federal children as third-party beneficiaries concerning the availability of public schools (page 850).

In *City of Inglewood v. City of Los Angeles*, 451 F. 2d 948 (9th Cir. 1972), the Ninth Circuit considered federal aviation grant agreements with respect to Los Angeles Airport, and found that the residents of the area were intended third-party

beneficiaries, and as such had standing to sue for breach of the agreements.

It is beyond argument that the federal policy interest here is uniform applicability of the highest possible safety standards in civil aviation. Such aviation is a federally preempted area of regulation. A uniform rule is necessary with respect to standing of injured parties, or their survivors, to sue for violation of safety provisions and regulations; and such a federal rule should permit intended third-party beneficiaries to sue, in line with modern third-party beneficiary decisions generally, and consistent with the two cases noted just above.

2. **A County in Partnership With the United States in Operation of an Airport, a Federally Preempted Sphere of Interstate Commerce, Loses Its State-Law Immunity From Suit for Its Own Negligent and Wanton Misconduct.**

Counties, unlike states, do not enjoy Eleventh Amendment protection, and may be sued in federal court. *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Pettibone v. Cook County*, 120 F. 2d 850 (8th Cir. 1941). The County's immunity here is purely a doctrine of state law. The Court below applied federal common law to *deny* petitioners a remedy (the third-party beneficiary remedy) which they *did* have under state law, and at the same time *embraced* state law insofar as it gave tort immunity to the respondent County.

This Court has held that even a state itself can lose immunity by entering a federal sphere of interstate commerce. *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184; reh. denied, 377 U.S. 1010 (1964). *Parden* was followed in 1964 in *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F. 2d 1001 (1968), where the Fourth Circuit found a waiver of state immunity from the state's entry into maritime commerce.

Then in 1970 the Tenth Circuit in *Briggs v. Sagers*, 424 F. 2d 130 (1970), cert. denied 400 U.S. 829, found that the Fair Labor Standards Act applied to a state-owned institution in Commerce; and in *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F. 2d 613 (1971), the Third Circuit, in dictum, stated: "A state may, by engaging in activities of paramount federal interests, waive its immunity under the Eleventh Amendment . . . whether such a waiver has taken place is a question of federal law" (454 F. 2d at 624-625). *A fortiori* the immunity of a *county*, which is a state-created immunity, not of federal Constitutional origin, can be so waived. Moreover, if federal common law is to be applied, then state law immunity is not applicable in any event.

3. **An Implied Civil Remedy Exists Under the Federal Aviation Acts for Death or Injury Caused by Flagrant Breach of Federal Statutory Safety Standards.**

There are some Court of Appeals cases which refuse to imply such a civil remedy with respect to activity not involving fault, or activity not related to personal safety matters, and the like. These include *Rogers v. Ray Gardner Flying Service, Inc.*, 435 F. 2d 1389 (5th Cir. 1970) reh. denied, cert. denied 401 U.S. 1010, where it was unsuccessfully sought to create vicarious bailor liability without fault; *Polansky v. Transworld Airways, Inc.*, 523 F. 2d 332 (1975), where passengers sued complaining about allegedly inferior tour accommodations; and the recent decision in *Rauch v. United Instruments, Inc.* (U.S. Court of Appeals for the Third Circuit, 12/30/76) 44 L.W. 2333. The Third Circuit in *Rauch* expressly noted that it was not ruling on the case "with actual victims" of an accident. Aside from these peripheral cases, which do not involve strong public policy issues, several district courts have, for some years, recognized an implied federal civil right of action in favor of one injured or killed by defendants' violation of aviation safety standards.

These cases include *Town of Easthaven v. Eastern Airlines, Inc.*, 282 F. Supp. 507 (D. Conn. 1968); *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Calif. 1972); and *In Re Paris Air Crash*, 399 F. Supp. 732 (C.D. Calif. 1975) We urge this Court to acknowledge the civil remedy in the case of death or injury directly resulting from flagrant breach of federal statutory safety standards.

4. **The United States District Court, Sitting in Diversity, Must Grant Standing to Sue to Parties Who Have Such Standing, as Contract Third-Party Beneficiaries, Under Applicable State Law.**

The captioned proposition is irrefutably true in the ordinary case. The opposite result has been reached below here by the process of (a) finding that there were strong federal interests involved, and then (b) finding that when such strong interests are involved, "federal common law" must apply, despite *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and then (c) finding that federal common law includes a very restrictive rule for third-party beneficiary standing, which standard the Court then finds plaintiffs cannot, as a matter of law, meet.

The cruel irony of achieving that result, by that reasoning, is that the real federal interest here, in promoting aviation safety, is an interest ill served by creating a shield of federal law to protect a county, operating an airport under a federal grant agreement, from liability for its own gross fault, when its own state law would not so shield it.

There is here a sub-issue of importance if the Court should determine that the state law rule on third-party beneficiary standing is the law to be applied. In such event we must ask the Court here to adopt Judge Morgan's conclusion that under the language of the grant agreement ("for the use and benefit of the public . . . safe operation . . . to serve the civil aviation needs

of the public; . . . to serve the aeronautical users of the Airport") the petitioners or their decedents were "intended" beneficiaries, which both Judge Dyer's opinion and Judge Morgan's opinion acknowledge to be the Georgia law requirement; and are not mere "incidental" beneficiaries as a matter of law, as Judge Dyer said in his panel dissent which the en banc Court of Appeals adopted *per curiam*.

ARGUMENT

1. Federal Common Law Permits Suits by Intended Third-Party Beneficiaries of Contracts, and Is Applicable Here Because the United States Was a Party to the Contract, Is a Party to the Lawsuit, and Important Federal Interests Are Served by Application of a Federal Rule Permitting Such Actions.

A. Background on This Issue

The issue of whether a federal common law rule on third-party beneficiary standing ought to apply to this case was not developed by any of the parties at the district court level, nor was it briefed or argued by any party, if memory serves, before the Fifth Circuit panel. The Miree petitioners urged the Court of Appeals, in the alternative, either to apply the Georgia third-party beneficiary rule (which we felt would clearly permit the action), or to find that the county waived immunity by its entry into a federally preempted sphere of interstate commerce, or, thirdly, to recognize a civil remedy under the federal aviation acts.

The issue of applicability of federal common law, and the finding of a possible federal common law third-party beneficiary rule, was raised by Judge Dyer in his panel dissent (A. P.C.-27), which argued that federal common law should apply, and that it was identical with the old Restatement (First) of Contracts, § 145 (1932) rule, which requires not only that the contract show the plaintiffs as intended third-party beneficiaries, but also show a specific intent that such beneficiaries be compensated for damages. After en banc hearing, the Court of Appeals adopted Judge Dyer's dissent, *per curiam*, as the opinion of the Court.

Petitioner's real interest here with respect to the third-party beneficiary issue is, of course, in being permitted to sue the County, and whether this comes about by recognition and ap-

plication of a federal or a state law rule is academic to the Miree petitioners themselves, as guardians of the three minor children whose parents died in the crash. But as counsel we have found it frustrating to have the Court below *ignore* federal policy interests in eliminating immunity from suit in aviation commerce, and *ignore* federal policy interests in possibly recognizing a civil remedy under the aviation laws; and then spontaneously adopt, *per curiam*, a restrictive and archaic supposed federal common law rule; and apply it, moreover, on the grounds that imperative federal interests compel that *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), not apply!

Thus we are in something of a quandary as to how to treat the issue of applicability of federal common law here; our embrace of it is tentative, conditioned upon the Court finding that it is not what Judge Dyer said it is. We will show in some detail that the cases relied upon by the Court below are not authority for the result reached, and that the federal common law rule actually is identical to the more liberal Georgia rule.

B. Analysis of the Cases Cited by the Court of Appeals on This Issue

Judge Dyer's opinion, which is now the *per curiam* opinion of the en banc Fifth Circuit, holds that federal common law is applicable by authority of *United States v. Seckinger*, 397 U.S. 203 (1970); *Smith v. United States*, 497 F. 2d 500 (5th Cir. 1974); and *First National Bank v. Small Business Administration*, 429 F. 2d 280 (5th Cir. 1970). He finds that these cases hold that federal common law should control "the contract's interpretation," (A. P.C.-27), in the case of a contract to which the United States is a party.

We submit that a fair reading of those cases suggests that federal common law will not be applied to achieve a result which serves federal interests more poorly than otherwise-applicable

state law, nor will it be applied in a way which in result achieves a harsh *lack* of uniformity with the law generally rather than furthering uniformity of decision.

In fact federal policy is opposed to immunity of governmental units from tort or contract claims—the United States has itself consented to be sued here; it makes no sense to say that federal interpretation must grant a Georgia County immunity from suit, by imposing a stricter test for third-party beneficiary standing than Georgia's own courts do. A suit against a county is *not* a suit against a state, where the Eleventh Amendment creates Constitutional immunity. *Lincoln County v. Luning*, 133 U.S. 529 (1890). It is our position in this Part 1 of our argument that federal common law should be applied here; and that federal interests in the interpretation of the airport grant agreement here require a finding that the contract language, e.g.: "[the County] will operate the Airport as such for the use and benefit of the public . . . to serve the civil aviation needs of the public" grants petitioners standing to sue on the contract for damages, under a federal common law contract rule. Chief Judge Brown, in his separate dissent (A.P.C.-13) felt that "federal law not only does not preclude the plaintiffs below from recovering as third-party beneficiaries, but that federal law **compels** this result."

United States v. Seckinger, Judge Dyer's only Supreme Court authority, holds that federal law controls interpretation of a contract between the United States and a private party entered pursuant to United States statutes, in a controversy between them as to its interpretation—namely, the right of the United States to seek indemnity from the contractor. Our case is different in that the County here was a party to the contract not only by reason of the federal aviation law but also pursuant to a Georgia statute, (The Georgia Uniform Airport Act, Ga. Code 11-204 *et seq.*), and we do not have in issue in this appeal the right of the United States to look to the County for indemnity but rather

the right of the users of the Airport to sue the County for damages for the County's breach.

Smith v. United States, 497 F. 2d 500 (5th Cir. 1974), the second of these cases cited by Judge Dyer (A.P.C.-27), was a case where employees of a subcontractor sued the United States and the prime contractor for damages for injury. The Court held that the United States was entitled to indemnity from the prime contractor even as to the United States' own negligence. The decision in *Smith* does not elucidate what it means to conclude that federal law controls. At page 508 of the opinion the court notes that there are some state cases with a somewhat different rule with respect to establishing indemnity when there is mutual negligence, but at page 509 the court notes that state decisions are often helpful in deciding federal questions, "but not when the Supreme Court has indicated a contrary view." The case indicates to us that a court dealing with interpretation of a contract to which the United States is a party will look to federal interests, and to both federal and state decisions, in reaching an appropriate result.

In *First National Bank v. Small Business Administration*, 429 F. 2d 280 (5th Cir. 1970), the third case relied upon in this section of Judge Dyer's opinion (A.P.C.-28), the Bank sued the Small Business Administration to enforce a loan guaranty agreement. The Fifth Circuit, on the question of liability under a loan guaranty, held that federal law

> controls the rights of the parties . . . by this we do not mean that a different result might be reached under the law of Texas, for the parties have given us no indication that the state would apply a different standard from the one we adopt. In a contract suit where the United States is a party as a general rule the contract principles of federal law govern. (page 286)

The Court goes on:

> The reason behind the rule of uniformity of decision is plainly applicable to the instant case. The policy manifested in the Small Business Act is national in scope . . . "the desirability of a uniform rule is plain." (pages 286-287).

This case, too, we submit, stands for a rule that in construing contracts to which the United States is a party, the court will look both to state cases and federal cases, and will reach a result which promotes both federal substantive policies and a federal policy of uniformity of decision.

In our case, application of Judge Dyer's federal common law rule, which we will show is clearly not the correct rule, would, on the contrary, promote *non*-uniformity. Most of the entities with which the United States makes grant agreements for airport development (municipalities, authorities, etc.) do not claim to have immunity at all. The result of Judge Dyer's rule would be to "federalize" for this one airport, or a few airports operated by entities which claim immunity, the condemned and archaic doctrine of governmental immunity.[1]

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[1] We have attempted to compile informally some data with respect to the number of airports which do claim immunity. The U.S. Department of Transportation, Federal Aviation Administration, publishes an annual report, *FAA Air Traffic Activity*. Table 5 for fiscal year 1976 thereof lists all airports with FAA control towers in order of "total aircraft operations." DeKalb-Peachtree (the airport in question here) was eightieth in terms of such operations.

We took as samples the top ten airports in terms of such "total aircraft operations" and the nineteen airports just larger than DeKalb-Peachtree. We then spoke by telephone to management or counsel for these airports (except we omitted several in California as the California rule of non-immunity became clear). We found that none of the top ten airports (including, as number five, Atlanta International) claims to have immunity from suit. With respect to airports ranked 61 through 79 (those just larger than DeKalb) we found that of these nineteen, fourteen definitely do not claim to have immunity. Of the remaining five, Boise Air Terminal, operated by the City of Boise, Idaho, notes that state law provides only for immunity from "governmental" activity, and that they carry $1,000,000 of liability

Moreover, it would do so when Georgia itself, in its own statute on third-party beneficiary standing, and in its own judicial decisions, has carved out at least this contract exception to the general rule of county immunity which does still prevail in Georgia.

If, however, the federal common law rule of third-party beneficiary standing is found to permit standing, as Georgia's rule would, and as the federal cases we cite later in part C of this Part 1 clearly hold, and as most modern cases from most jurisdictions would, then application of a federal common law rule would serve both valid federal purposes: It would bring the result in this case in line with what the result would have been if the crash had taken place at most other airports (i.e., the "sponsor" would have liability for its wanton or negligent acts) and thus would promote uniformity of decision; and it would, by avoiding application of immunity, promote the federal interest in encouraging air safety. Such a result would bring the decision into line with the law generally, and it would create a method for imposing contract liability on those few airport-operating entities which still assert tort immunity.

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insurance, which has paid with respect to non-aircraft accidents. Cleveland-Hopkins International Airport is operated by the City of Cleveland, Ohio, and the office of the City Attorney acknowledges that the airport operation is probably "proprietary" and therefore not immune under Ohio law. The Cleveland airport carries liability insurance. Baltimore-Washington International Airport is operated by Maryland, and an assistant attorney general there advises that there is immunity under state law, but that as a matter of policy it is not ordinarily pleaded. Norwood (Mass.) Memorial Airport, according to Town Counsel, would have immunity under state law if the activity was deemed "governmental," and he reports that the issue has not arisen. The response on behalf of Beverly (Mass.) Municipal, from the City Solicitor there was essentially identical to that of Norwood, Mass.; but he commented that the activity of the airport would probably be proprietary. Assuming that airport operation would in any case be deemed "proprietary," it appears that of the sample surveyed, only Baltimore-Washington International

We disagree with Judge Dyer's reading of the federal cases, and do not find that the federal cases clearly support the position of Restatement (First) of Contracts, §145 (1932), which says in effect that the contract must not only manifest an intent to benefit the plaintiff but must specifically manifest an intent to *compensate* the plaintiff. This is concededly *not* the law in Georgia, nor in most jurisdictions; and we submit that it is not the rule of federal common law.

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might have some other state law basis for claiming immunity, but that such immunity is normally not asserted.

In tabular form, our survey can be summarized as follows:

Airport	*State*	*Rank*	*Immunity*
Chicago O'Hare Int'l	IL	1	No
Santa Ana	CA	2	No
Van Nuys	CA	3	No
Long Beach	CA	4	No
Atlanta Int'l	GA	5	No
Los Angeles Int'l	CA	6	No
San Jose Municipal	CA	7	No
Torrance Municipal	CA	8	No
Phoenix Sky Harbor Int'l	AZ	9	No
Opa Locka	FL	10	No
St. Petersburg Clearwater	FL	61	No
Daytona Beach	FL	62	No
Chicago Palwaukee	IL	63	No
Beverly Municipal	MA	64	See text above
Boise	ID	65	See text above
Tucson	AZ	66	No
Fresno Air Terminal	CA	67	No
Cleveland Hopkins Int'l	OH	68	See text above
Baltimore Washington Int'l	MO	69	See text above
Napa County	CA	70	No
Morristown	NJ	71	No
Teterboro	NJ	72	No
Lincoln Municipal	NB	73	No
Albuquerque Int'l	NB	74	No
El Monte	CA	75	No
Rochester Monroe County	NY	76	No
Norwood	MA	77	See text above
Melbourne	FL	78	No
Milwaukee Mitchell	WI	79	No
Atlanta DeKalb-Peachtree	GA	80	Claims immunity here

Judge Dyer lists seven cases for the proposition that there is such a restrictive federal rule (A.P.C.-28). None of the cases are from the United States Supreme Court. Moreover, we respectfully submit that they do not support him. In view of Judge Dyer's opinion having become the en banc *per curiam* opinion, we shall consider each:

West v. Morrison-Knudsen Company, 451 F. 2d 493 (9th Cir. 1971). This is *not* an application of "federal common law" but is a diversity jurisdiction opinion under the unusually restrictive law of the State of Montana. The case holds that an injured employee of a subcontractor is not entitled to sue as a third-party beneficiary of a safety provision in the prime contract between the United States and the general contractor. The Court expressly states at the top of page 494 that it so rules "*because under the law of Montana* such a beneficiary of safety clauses in a contract could not recover in the absence of a specific promise in the contract to pay damages." (Emphasis added.)

> "Appellants argue, however, that the contract provisions operate to change the basic rules of tort so that a duty by contract has been created, the breach of which creates a liability in tort for personal injury. They support their argument by the citation of cases from other jurisdictions which so hold. . . . *The problem is not the weight of authority wherever it may be, but the law of the State of Montana.*" (Emphasis added.)

Hensley v. United States, 279 F. Supp. 548 (D. Mont. 1968), is the next cited case by Judge Dyer. Here the United States had a contract with a construction company for building a dam. An employee of that corporation was injured when an inadequate rope broke. The contract between the company and the United States stated that the contractor shall be fully responsible for safety of the employees. The plaintiff,

the injured employee, it should be noted, was covered by the Montana Workmen's Compensation Act, and was being compensated under that statute. The plaintiff sought further compensation as third-party beneficiary of the contract between the United States and his employer. The District Court focused solely upon the *Montana* third-party beneficiary statute, Section 13-204, RCM, 1947, which reads as follows: 'A third-party may enforce a contract made expressly for his benefit." The Court notes that the Montana Supreme Court has ruled that the statute means the expression must be "in direct terms." Likewise, the Court notes that the Ninth Circuit, in *National Surety Co. of New York v. Ulman*, 68 F. 2d 330 (9th Cir. 1933), cert. denied 292 U.S. 624, "after an extensive review of the Montana authority concluded that a contract of the kind involved here is not enforceable by a third-party." If the case does stand for a rule that a contract must not only evidence an intent directly to benefit the third-party plaintiff but must also specifically evidence an intent to compensate him, then it is perfectly clear that the Court in *Hensley* is following *Montana* law, as was the court in *West v. Morrison-Knudsen*, and not federal law or a general rule of law.

Judge Dyer next cites *Brotherton v. Merritt-Chapman & Scott Corp.*, 213 F. 2d 477 (2d Cir. 1954). This was an opinion by Judge Frank, which says simply that this was a clear case where certain described contract language does not create third-party beneficiary status for the plaintiff. Of the six cases cited by Judge Frank in the opinion three of them are state court cases, although the question the case presents was a contract between the United States and a construction firm. Apparently Judge Frank did not consider state law cases irrelevant to determine who is a third-party beneficiary under a federal contract, but simply found that the particular contract provision in question was, as Judge Frank states at the beginning of the opinion, "intended solely for the government's benefit and not for the benefit of other contractors as

third-party beneficiaries. We think this is so clear that we can content ourselves with a mere citation of leading cases."

Next, Judge Dyer cites (at A.P.C.-29) *Johnson v. Redevelopment Board of the City of Oakland, California,* 317 F. 2d 872 (9th Cir. 1963). The case holds that persons affected by an urban renewal development project involving contracts between the United States and a California agency may not sue the California agency as third-party beneficiaries of those contracts, to enjoin the project. The Court holds that the contract "is governed by federal law" and "the federal courts have consistently held that those not party to the contracts have no standing to enforce conditions imposed on redevelopment agencies by the United States. . . ." (page 874). The case does use a federal rule to find plaintiffs not to have third-party beneficiary standing. That the rule of that case is clearly limited to contracts concerning urban development is shown by the balance of the opinion, which goes on to explain that, in this area of legislation, three alternative remedies to such a third-party beneficiary lawsuit are provided, none of which the plaintiffs there pursued. They are: (1) a grievance procedure before the federal housing administration; (2) federal and state requirements of public hearings, at which the plaintiffs did not appear; and (3) a California statutory provision for suit on the project in state court within 60 days of adoption. This also the plaintiffs failed to pursue.

Thus the case does not announce any general federal disinclination towards third-party beneficiary suits on federal contracts, and it goes to some pains to show that the result of disallowing third-party beneficiary status to those plaintiffs is not unfair, because of the several alternative remedies built into the statutory scheme. In fact the case indicates a proper willingness of federal courts, when considering possible third-party beneficiary claims against state agencies under federal contracts, to review the fairness and adequacy of available alternative rem-

edies, before foreclosing third-party beneficiary relief as a matter of federal contract interpretation.

Judge Dyer next cites *Mahler v. United States,* 306 F. 2d 713 (3d Cir. 1962). Here injured plaintiffs sued the United States because a boulder on a federal highway fell on plaintiff's automobile. The Court expressly looked first at state law (at page 722) to see if there was any "Pennsylvania rule of law which would impose liability on a private person under similar circumstances." The Court found no such state rule. It then looked to whether there was any basis for liability under the Federal Tort Claims Act. There it noted the existence of an exception from United States liability if the action by the United States was made "at a planning rather than operational level . . ." (page 723). The Court concludes that the United States' duties here were clearly "planning" rather than "operational" and affirmed judgment for the United States. The case really is of little relevance to our situation *vis a vis* County liability, but it should be noted that even here, where the question was the liability of the United States itself, the Court looked *both* to state law *and* to federal law to see if a basis for liability could be found under *either.* We submit that this is a proper analysis by the Third Circuit: the court looked both to state law and to federal law, and apparently would permit an action under either.

Housing Corporation of America v. The United States, 468 F. 2d 922 (U.S. Ct. Cl. 1972), next cited by Judge Dyer (A.P.C.-29), we respectfully submit, is almost totally inapplicable—it is a question of a third-party beneficiary suing the United States in an area where the United States has not waived its sovereignty.

Finally, Judge Dyer, in this series of citations, relies upon *Sayre v. United States,* 282 F. Supp. 175 (N.D. Ohio 1967). This, like the *Johnson v. Redevelopment Board* case cited by

Judge Dyer as supporting a restrictive federal rule of third-party beneficiary rights, is on its facts and by its express language an interpretation of an urban renewal venture between the United States and a local government. The case is brought by a property owner claiming to have been injured by the project, in that the use and value of his real property was damaged. The United States was dismissed as a defendant on its motion for summary judgment, under the "discretionary function" exception to the Tort Claims Act, and certain limited claims against the City of Cleveland were allowed to proceed. Specifically upon the third-party beneficiary issue, the Court holds at page 190 that: "The federal courts have consistently held that those not parties to the contract have no standing to enforce conditions imposed on *redevelopment agencies* . . ." (emphasis added).

Thus the seven cases cited by Judge Dyer in his panel dissent adopted as the *per curiam* opinion of the Fifth Circuit, as supportive of the use of a "federal common law rule," and specifically a restrictive rule along the lines of Restatement (First) of Contracts § 145 (1932), can be summed up as follows: Two (*Sayre*, and *Housing Corporation*) are expressly limited to contracts with redevelopment agencies, at the suit of persons claiming to be injured by urban renewal projects. In one (*Mahler*) the Court expressly looked both to state and federal law for a basis of liability. In another (*Brotherton*) the Court seems implicitly to look to both state and federal cases. In two (*West*, and *Hensley*) the Court specifically stated that it was following a restrictive Montana state rule.

The sum of all these cases seems to us to be a willingness of other federal courts to look both at possible available state remedies and at general rules of contract interpretation when dealing with contracts to which the United States is a party. We do not find in these cases any sweeping declaration that a special body of federal common law will be applied in such cases to deny standing to sue which would exist under state or general law.

Rather, the gist of the cases seems to be, and we respectfully submit that the rule ought to be, that in construing contracts to which the United States is a party a federal court is not strictly bound by *Erie* blindly to follow the rules of contract construction of the forum state, but will take into consideration state law, general law, and federal interests and policy; and in an appropriate case will apply, as a federal common law rule, a rule of interpretation which takes into account all these factors.

Application of that practice would, in our case, *Miree*, obviously result in review of the third-party beneficiary law of the forum state (which we submit would permit plaintiffs' action), plus review of the modern decisions from federal courts generally and review of the law generally as explicated by modern treatises and texts and would derive from all these a rule for the case, as we will attempt to do in Part 1-C of this brief. This, we submit, is the proper process of analysis for a federal district court today when the parties are before it with diversity and with asserted federal question jurisdiction, when construction of a federal contract is at issue, and when important federal policies (here aviation safety, and uniformity of interpretation of federal contracts) are involved.

To return to Judge Dyer's opinion, we note that it closes with a consideration of three aviation cases, which do not support his position. We shall consider each.

Port of New York Authority v. Eastern Airlines, Inc., 259 F. Supp. 745 (E.D. N.Y. 1966). The Port of New York Authority, which operates Laguardia Airport, brought an action for an injunction against several airlines to stop them from jet aircraft use of certain runways. The District Court found that the plaintiff was entitled to an injunction to enforce its regulations with respect to use of the runways.

United Airlines, one of the defendants, had claimed that the Port's regulation was contrary to the Port's agreements with the

FAA contained in grant agreements. The court held that there is nothing in the grant agreements abridging the right of the Port to enact such regulations, and that in any event the airline does not have standing as a third-party beneficiary to make such an assertion. As the court found that the grant agreement does not prohibit the Port's regulation, which was a noise abatement rule, the language concerning United's standing to assert the benefit of the grant agreement is of course purely dictum. Moreover, the court says "these agreements were not made expressly for the benefit of the airlines" (page 750). The case thus does not bear upon whether the *safety* provisions of the specific grant agreement in question in *our* case were intended to benefit the *public*. As noted elsewhere in this brief, the clear language in the grant agreement in our case recites that the Airport will be operated "for the use and benefit of the public." *Port of New York Authority* contains nothing, even in dicta, which cuts against our contention that members of the *public* (not commercial airlines) are express third-party beneficiaries of *safety* provisions of our grant agreement.

San Francisco v. Western Airlines, Inc., 22 Cal. Rptr. 216 (1962). This is a California state court intermediate appellate decision in a case brought by an airline with respect to discrimination in charges in rates paid by it. The airline focuses on the language in the contract which says that the Sponsor will operate the Airport "for the use and benefit of the public on fair and reasonable terms and without unjust discrimination." The Court holds that this language does not show any intent to confer a benefit upon the *air carriers* such as Western Airlines. The Court says: "To recover as third-party beneficiary, one must show that the contract in question was made expressly for his benefit." The Court cites for that proposition California Code § 1449 and relies on that particular state law governing third-party beneficiary rights in California. As in *Port of New York* this case is distinguishable in being brought by an airline and not a member of the public; and more importantly as being a

purely commercial complaint and not a matter pertaining to safety.

Eastern Airlines, Inc. v. Town of Islip, 229 N.Y.S. 2d 117 (1962). This was a decision of a state trial court sitting non-jury in an action brought by the airline against the City, in which the airline both sued in tort and claimed to be a third-party beneficiary of the grant agreement between the City and the United States. The plaintiff's aircraft was damaged when it ran off a runway into a snowbank. It was found that the airline was guilty of clear contributory negligence and that the airline's own negligence was the proximate cause of the accident. The court does embrace the Rule of Restatement of Contracts (First) § 145 (1932) with respect to additional counts where the airline seeks third-party beneficiary status.

Of Judge Dyer's three aviation cases one is a district court case, one is an intermediate state court appellate decision, and the third is of a state trial court sitting non-jury. Moreover, the holding of each of the three cases is that an *airline* is not an intended third-party beneficiary under a grant agreement.

Thus we respectfully suggest that Court of Appeals for the Fifth Circuit in our case failed to demonstrate the existence of any compelling "federal common law" rule which would deny to the plaintiffs that standing to sue which the law of Georgia gives them and which most judicial decisions generally, from federal courts and courts in other states, would also give them. There is no authoritative modern support for the rule of the Restatement (First) of Contracts § 145 (1932), and it ought not to be declared as the rule of federal common law.

C. The Federal Common Law Rule Permitting Third-Party Beneficiary Actions

As noted in Judge Morgan's dissent from en banc opinion (A.P.C.-3) there are at least two United States Court of Ap-

peals cases, including one from our circuit, supporting the view that federal common law should apply on the third-party beneficiary issue and would permit petitioners' action here. They are *Bossier Parrish School Board v. Lemon*, 370 F. 2d 847 (5th Cir. 1967); and *City of Inglewood v. City of Los Angeles*, 451 F. 2d 948 (9th Cir. 1972).

In *Bossier* the Fifth Circuit held that black children who were not allowed to attend a county (Louisiana parish) school system could sue as third-party beneficiaries under a contract between the United States and the school board. As Judge Morgan notes in his dissent here (A.P.C.-11), "Because *Bossier* was brought as a federal question suit, it is clear that the panel was applying federal common law when it held that the assurances given by the defendant in return for the United States grants made permissible a third-party beneficiary suit by plaintiffs." *Bossier* is compelling authority in the Fifth Circuit, directly in point, and was absolutely ignored by the majority opinion below. It is a federal question decision from that Court in an opinion by Judge Wisdom, in which Chief Justice Burger (then sitting as a circuit judge from the District of Columbia Circuit), along with Chief Judge Brown, joined. The Department of HEW had given money to the School Board in exchange for "assurances" that all children at a federal base would be duly admitted to the schools. The Fifth Circuit in *Bossier* adopted the language of the district court, which had held:

> "Defendants by their contractual assurances have afforded rights to these federal children as third-party beneficiaries concerning the availability of public schools" (page 850).

The Fifth Circuit there found these individual citizens to be third-party beneficiaries of a contract between the United States and a county agency, with standing to sue as such third-party beneficiaries, just as the panel majority opinion found in the instant case. This is an application of general, or federal com-

mon law principles. No restrictive interpretation in the nature of Restatement (First) of Contracts § 145 (1932) is suggested in the *Bossier* opinion because it is obvious that the United States sought those assurances, in its contract, for the direct benefit of the users of the facility, just as is clear in our case. It should be noted that Chief Judge Brown, who had joined in the *Bossier* opinion, joined in the dissent here, and dissented separately, as well, stating that federal law should control and that federal law "not only does not preclude the plaintiffs below from recovering as third-party beneficiaries but that federal law compels this result." (A.P.C.-14).

A similar case, and one involving an airport grant agreement, as here, is *City of Inglewood v. City of Los Angeles*, 451 F. 2d 948 (9th Cir. 1972) where another United States Court of Appeals adopted a similar standard, on facts which in many respects are closer than any cited case to the case at bar but yet not as strong as ours: property owners (individual plaintiffs, as well as the City of Inglewood) adjoining an airport were given standing to sue as intended beneficiaries under a Grant Agreement concerning the Los Angeles Airport, to complain of breaches of provisions in those agreements. The Ninth Circuit said:

> "It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary. The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents of the area. . . ."

City of Inglewood was a federal question case involving an airport grant agreement, just as in our case, and the Ninth Circuit held that the federal aviation acts *did* contemplate that the assurances required by the United States of the airport authority as part of the grant agreement *were* intended for the

benefit of the local residents and the users of the airports, both with respect to flight safety and welfare of persons living nearby the airport. The Ninth Circuit *allowed* the third-party beneficiary action. Its opinion is absolutely in conflict with that of the en banc majority here. How can the Court of Appeals, and the respondent here, possibly reconcile that holding with a contention that some sort of special restrictive rule applies to third-party beneficiaries when a governmental contract is involved? *City of Inglewood* was cited with approval, on the third-party beneficiary issue, in dictum, by the Seventh Circuit, in *Luedtke v. County of Milwaukee*, 521 F. 2d 387 (1975) at p. 391.

We submit that the Fifth Circuit's earlier opinion in *Bossier*, and the Ninth Circuit's opinion in *City of Inglewood* have clearly rejected any restrictive "Restatement (First) of Contracts, § 145" rule. Uniformity of decision is an important factor in the federal courts, particularly as they deal with federal contracts. Judge Dyer acknowledged just that in his panel dissent which the en banc Court of Appeals adopted *per curium* (at A.P.C.-27). Yet the present en banc opinion is diametrically opposite both to the Ninth Circuit and to the Fifth Circuit's own ruling in *Bossier*. In addition to uniformity, a goal here should be to promote what should be considered as a paramount goal of the federal aviation laws—safety. It is too clear to need arguing that liability for flagrant breach of safety provisions encourages safety, and that federalizing immunity from suit encourages lack of care.

Not only have the Fifth and Ninth Circuits, in *Bossier*, and *City of Inglewood*, and the leading treatise writer[2] rejected the old Restatement § 145 rule, but ten years ago the American

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[2] Williston, Contracts, 3d Ed. §374, at p. 945 states: "The opposite and growing view holds that a member of the public may avail himself of the provisions of the contract between the public body and the contractor, intended for the protection of the public, in an action against the contractor."

Law Institute itself recognized that modern needs and modern cases have rendered the old § 145 inappropriate. Tentative Draft No. 3 of the Restatement of the Law (Second), Contracts, dated April 18, 1967, withdraws the language of § 145 and replaces it with the following:

> §145. GOVERNMENT CONTRACTS
>
> (1) The rules stated in this Chapter apply to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.
>
> (2) In particular, a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless
>
> (a) the terms of the promise provide for such liability; or
>
> (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

The official comments to the proposed new rule begin with this statement: "Beneficiaries of government contracts have often been denied rights because of the doctrinal difficulties referred to in the Introductory Note to this Chapter. Subsection (1) reflects the disappearance of those difficulties, but leaves room for the weighing of considerations peculiar to particular situations."

Thus the new Restatement §145, at (1), would apply the general third-party beneficiary rules to contracts with governments and government agencies, and the special exception for

government contracts which Judge Dyer relied upon is withdrawn from the proposed new §145 entirely. Moreover, new subsection (2)(b) indicates specifically that in our case where the promisee [the United States—a defendant in our case] is itself subject to liability to the third-party beneficiary, and a direct action against the promisor [the County] is consistent with the terms of the contract and the policy of the law authorizing it, the action will be allowed. Subsection (2)(b) also makes it clear that such third-party rights include suit, as here, for *consequential damages*. (*Bossier* and *City of Inglewood* had not themselves involved claims for money damages). Of course in our case, as we have argued, an action is not only "consistent with" the policy of the federal aviation acts pursuant to which the contract was made, but ought to be compelled by the policies of those federal statutes. Moreover, the intent of the parties is made even more manifest by the County's purchase of liability insurance for this airport. In our first brief to the Court of Appeals panel we argued at pp. 21-24 that the Plaintiffs' First Amendment to Complaint (A. 53) should have been allowed. That amendment proposed to add as a defendant the County's insuror, which issued an "Aviation Insurance Policy" to the County with respect to its operation of the Airport. As pleaded, (A. 53) that insurance policy, purchased by the County, contained specific provision that "the company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the State performing governmental function." As that argument found no support among the panel we did not reargue it to the en banc Court of Appeals, or assign it specifically as a separate question presented here. However, we do respectfully ask the Court to note that the record here includes our motion to amend to add the County's insuror as a defendant, dated January 22, 1974 (A. 53). We offer the fact of the County's purchase of liability insurance (which policy contained the waiver of immu-

nity language quoted above) in support of our position that the clear intent of the grant agreement was to contract for the express benefit of "the public" (grant agreement, Part III, "Sponsor's Assurances, ¶2; A. 36) and "the aeronautical users of the Airport" (grant agreement, Part III, Sponsor's Assurances, ¶6; A. 36).

2. A County in Partnership With the United States in Operation of an Airport, Which Is a Federally Preempted Sphere of Interstate Commerce, Thereby Loses Its State-Law Immunity From Suit for Its Own Negligent and Wanton Misconduct.

The Commerce Clause constitutes a cession by the States to the federal government of jurisdiction to regulate interstate commerce. The Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. § 1301 *et seq.*, and The Airport and Airway Development Act of 1970, 84 Stat. 219, 49 U.S.C. § 1701 *et seq.* clearly establish that the federal government has preempted the field of aviation flight safety. There have been a number of cases in the federal courts where states, and state agencies, have claimed governmental immunity from suit although operating within some "federal sphere" under the Commerce Clause. The cases have included state operated railroads, interstate highway projects, harbor activities, and other areas of commerce where there is what is found to be a "paramount federal interest." The cases have found that the State, by engaging in such activities pursuant to federal statutes, will be deemed, as a matter of *federal* law, to have consented to suit. When the agency involved is a county, that result is most easily reached. Counties, such as the respondent here, do *not* have Eleventh Amendment protection, and may be sued in federal court. *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Pettibone v. Cook County*, 129 F. 2d 850 (8th Cir. 1941). The immunity of the respondent county in our case is purely a doctrine of state law. Inas-

much as the Court has held that even states themselves, and entities which are alter egos of states, may lose their immunity, it seems even clearer that the immunity of a county, which does not have Eleventh Amendment protection, may be lost. It might be said that the chief anomaly of the majority opinion of the Court of Appeals here is that while the Court felt obliged to follow what it thought to be a *federal* common law rule of third-party beneficiary standing, it unhesitatingly applied a *Georgia* rule creating tort immunity for the respondent County.

Perhaps the leading case on loss of immunity by a state itself is *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, reh. denied 377 U.S. 1010 (1964). The opinion was by Justice Brennan. He stated: "The question in this case is whether a State that owns and operates a railroad in interstate commerce may successfully plead sovereign immunity in a federal court suit brought against the railroad by its employee under the Federal Employers' Liability Act." He continues: "The Court has recognized that an unconsenting State is immune from federal-court suits brought by its own citizens as well as by citizens of another State. . . . But the immunity may of course be waived; the State's freedom from suit without its consent does not protect it from a suit to which it has consented." (377 U.S. at 186). The Court concludes that when Congress made the F.E.L.A. statute applicable to "every" railroad in interstate commerce, it meant just what it said. Against the defendant's argument that Congress did not have the power to abrogate immunity in this context, the Court held that the Statute was properly enacted in exercise of the United States' power to regulate interstate commerce. At 377 U.S. 191 the Court states: "The States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." The Court continues: "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." (377 U.S. at 192). Continuing, ". . . the question whether a State has waived its immunity is one of federal law . . . whenever the waiver is asserted to arise from an act done by the State within the realm of congressional regulation. . . . When a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. . . ." (377 U.S. at 196).

A considerable body of law has built up since *Parden* applying and perhaps expanding its rule. In 1968 the Fourth Circuit in *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F. 2d 1001 considered the suit of a ship owner against a Virginia tunnel district for damages as result of negligence. The Court concluded that the tunnel district, although a political subdivision of the State, organized to perform an essential governmental function, could be sued in federal court. The Court concluded that the State's immunity was relinquished

> "by seeking and obtaining admission into an exclusive Federal realm—interstate and foreign commerce . . . necessarily, the State recognized that she built in the Bay only by sufferance of the Federal government. . . . To begin with, whether Virgina's entry into the Federal province amounts to consent to be sued, and to be sued in the United States court, is a question of Federal law. Hence, the decision of the State court upon the State's invulnerability to suit is not conclusive in resolving the relationship of the State and the plaintiff in a dispute arising in the Federal zone. . . ." (404 F. 2d at 1003).

The Fourth Circuit goes on to note that causes involving activities in the navigable waterways are to be adjudicated in admiralty, pursuant to 28 U.S.C. § 1333, and that the tunnel district could therefore be sued for a maritime tort in Federal Court. Section 1333 merely says that district courts have exclusive original jurisdiction of cases of admiralty.

In 1969, the Fifth Circuit, in *Centraal Stikstof Verkoopkantoor v. Alabama State Docks Department*, 415 F. 2d 452 (5th Cir. 1969), recognized the *Parden* rule but read it very narrowly. The action was by a Dutch plaintiff against the Alabama State Docks. The Fifth Circuit held that: "As long as the sovereign immunity claim does not prevent federal relief which would otherwise be attainable, we see no virtue in invoking federal jurisdiction. . . . The essential question is whether Docks as a warehouseman has entered into a federally regulated sphere in which a federal remedy is available." (415 F. 2d at 455). The Fifth Circuit considered the federal statutes involved, including the Shipping Act, the Interstate Commerce Act, and the Coast Guard Act, and found that there was no federal remedy under any of them. Therefore, it concluded that on the case presented there was no loss of sovereign immunity by reason of federal law. The Court went on, however to find that a claim *was* properly stated against the Dock's insurance company, a result also ironic in our case, where we were not permitted to join the County's insuror as a defendant, as noted earlier in this brief.

The development of the *Parden* rule continued, in 1970, when the Tenth Circuit issued an opinion in *Briggs v. Sagers*, 424 F. 2d 130. This was an action by employees of a state-owned institution pursuant to the Fair Labor Standards Act. The District Court had dismissed the case for want of jurisdiction. On appeal the State of Utah contended that the *Parden* rule was inapplicable because the operation of the State institution had commenced prior to the 1966 amendments to the Fair Labor Standards Act which had extended coverage to employees of hospitals, etc. Utah also argued that unlike the case in *Parden* the regulated activity in its case is "governmental in nature." The Tenth Circuit concluded that whether the activity be described as governmental or proprietary is irrelevant when the State is acting within an area delegated to the federal government. In such an area, the Court says, the federal government "may override countervailing state interests." (at p. 133). The

Court then considered the question of whether there is to be a distinction between continued participation in a sphere of activity commencing before enactment of federal legislation and entry into the field after federal legislation is enacted. The Court concluded: "The regulatory power of Congress, although limited to constitutionally defined matters, e.g., interstate commerce, is plenary as to those matters." The Court concludes that the Fair Labor Standards Act does apply to the State.

Also in 1970, the Third Circuit considered the "federal sphere" concept, in the case of *Red Star Tow. & Transp. Co. v. Department of Transp. of N. J.*, 423 F. 2d 104 (1970). There a barge owner sued a department of the state for damages for failure to operate a bridge properly in interstate commerce. Unlike the *Chesapeake Bay* case in the Fourth Circuit, supra, the Third Circuit finds on the facts that there was no loss of state immunity. The Court concedes that its ruling is contrary to *Chesapeake Bay* but holds that it will not find a loss of immunity unless Congress, in legislating in the field in question, created a new remedy to protect private persons.

But in 1971, in *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F. 2d 613 (1971), the Third Circuit seems to have expressed intention to follow *Parden, Chesapeake Bay,* and *Briggs*. While affirming a district court which dismissed a complaint against the Pennsylvania Department of Highways for reasons irrelevant to our issue, the Court of Appeals took pains to comment at page 624 on the finding of the district court that the Department was immune from suit. The Court of Appeals said: "While the conclusions which we have reached on the merits render that holding more or less academic, we suggest that the district court opinion on this issue is at least questionable . . . A state may, by engaging in activities of paramount federal interest, waive its immunity under the eleventh amendment . . . Whether such a waiver has taken place is a question of federal law." (454 F. 2d at 624-25). At the conclusion of the

quoted language the Court cites the *Chesapeake Bay* case from the Fourth Circuit, which a year earlier it had rejected, and goes on to cite the opinion of the Fifth Circuit in *Named Individuals* (infra). The Court went on to say:

> "Much the same can be said about the sovereign immunity contention. It seems unlikely that having undertaken to apply for participation in the federal primary, secondary or interstate road systems a state can, if it decided the federal law is too onerous, attempt to withdraw and assert the defense that its actions are beyond challenge in a federal court. But we leave that issue for definitive determination in a later case, with the caveat here that our affirmance in this case is not to be construed as an approval of the district court's sovereign immunity holding." (454 F. 2d at 655).

Thus one would have to conclude that both the Third and Fourth Circuits have now adopted a broad construction of *Parden*. Also in 1971 the Fifth Circuit, having attempted to read *Parden* narrowly in *Centraal*, published its opinion in *Named Ind. Mem. of San Antonio Con. Soc. v. Texas Highway Dept.*, 446 F. 2d 1013 (1971), where rehearing and rehearing en banc were denied. Judge Thornberry wrote the opinion for a panel including Judges Morgan and Clark. The *Named Individuals* case challenged construction of a federal-aid expressway in San Antonio through a park area. The United States Department of Transportation and the Texas Highway Department made motions for summary judgment which the District Court granted. The Fifth Circuit reversed and remanded. The Court noted the existence of several recently enacted federal statutes dsigned to protect park lands from destruction by federal projects: § 4(f) of the Department of Transportation Act of 1966, 23 U.S.C.A. § 138 (Supp. 1971); § 138 of the Federal Aid to Highways Act of 1968, 49 U.S.C.A. § 1653(f) (supp. 1971); and § 102(2) of the National Environmental Policy Act of 1969. It is undisputed that the Secretary of Transportation did not comply with the

statutes. The procedural history of this complicated litigation, and some of the issues, are not relevant to our issue. Important to our case, however, is consideration of the argument made by Texas that it is free to ignore the federal statutes if it chooses to proceed to build the highway with its own funds. The Court of Appeals rejected that argument, saying:

> "We are not impressed with this argument. If we were to accept it, we would be giving approval to the circumvention of an Act of Congress. The North Expressway is now a federal project, and it has been a federal project since the Secretary of Transportation authorized federal participation in the project on August 13, 1970. As such, the North Expressway is subject to the laws of Congress, and the State as a partner in the construction of the project is bound by those laws." (page 1027).

At page 1028, the Court of Appeals continued:

> "No one forced the State to seek federal funding, to accept federal participation, or to commence construction of a federal aid highway. The State, by entering into this venture, voluntarily submitted itself to federal law. It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law."

Judge Clark dissented from the portion of the opinion quoted just above, and would have allowed Texas to continue in the construction of a state project, if Texas "makes a final disengagement from what appears to me more nearly a proposal than a marriage . . ." Petition for rehearing was denied and petition for rehearing en banc was denied.

If the relationship between Texas and the United States in respect to the San Antonio Freeway Project, upon which construction was just beginning, might at least to one member of the Court of Appeals for the Fifth Circuit be seen to be so

nearly unexecuted as to allow the State to extricate itself from the federal sphere, such surely is not true in our case, where we have a long-term relationship between the United States and DeKalb County with respect to funding and operation of the airport in question here.

In this connection it should be stressed that the United States, as a defendant in our case, having been sued under the Tort Claims Act, has cross-claimed against DeKalb County. The District Court apparently recognized that the County is not immune on those cross-claims, and did not dismiss them. Thus the County remains a defendant, and will, vis-a-vis the United States' claims, have to attempt to show that it was not negligent in operation of the airport. This leads to a strikingly anomalous result, if dismissal of petitioners' claims against the County is affirmed by this Court. The United States, which is sovereign in the field of interstate commerce, would be liable to suit, and its partner in the airport project, the County, which has no sovereignty in this federally-controlled area, would be immune vis-a-vis the petitioners, but apparently not immune on the cross-claims of the United States. Surely Congress in passing the civil aviation statutes which made this federal-county partnership possible should not be deemed to have intended that the United States, but not its local partner, would be liable to one injured in the course of using the project facility. And surely if there is loss of immunity on the United States' cross-claims for indemnity or contribution, it does not make sense to leave just enough vestige of immunity to bar the direct claims against the County.

In the Court of Appeals below, the respondent DeKalb County contended that the line of cases following *Parden* is no longer viable, at least in the Fifth Circuit, because of that Court's 1973 opinion in *Intracoastal Transportation Incorporated v. Decatur County, Georgia*, 482 F. 2d 361 (5th Cir. 1973). We concede that the Fifth Circuit's opinion in *Intracoastal* (and more to

the point, its refusal even to discuss the issue in opinion here) shows a reluctance to accept this Court's rule laid down in *Parden v. Terminal R. of Alabama Docks Dept., supra*, just as the Fifth Circuit's 1969 opinion in *Centraal* attempts to narrow *Parden* as much as possible. But in fact the Fifth Circuit (leaving aside its obligation to follow *Parden*) cannot point to its own *Intracoastal* opinion as grounds for refusing to deal with our "federal sphere of interstate commerce" argument, which we have made consistently throughout this litigation. For, as Judge Gewin, of the Fifth Circuit, noted in *Intracoastal*, at footnote 1 to that opinion, at 484 F. 2d at 362:

> "At the outset it should be noted that this appeal deals exclusively with the Georgia Department of Transportation, [which] is the alter ego of the State of Georgia . . . the propriety of the suit against Decatur County, Georgia, is not before this Court. See, *County of Lincoln v. Luning*, 133 U.S. 529, 530, 10 S Ct 363, 33 L. Ed 766 (1890)."

Judge Gewin thus makes the precise distinction made in our brief here, above, where we cite *County of Lincoln* for the rule that while the Eleventh Amendment grants immunity to the states, counties do not enjoy that protection under the Amendment. Thus the immunity discussed and preserved in *Intracoastal*, which Appellee DeKalb County says disposes of our contentions, was federal *constitutional* immunity, in no way involved here. The *Intracoastal* decision was closely drawn, and even as limited drew a dissent from Judge Wisdom. It is not persuasive on the issue presented here, of holding a county, while operating an airport as a proprietary function, liable for its wanton conduct and its breach of a contract with the United States which resulted in deaths of interstate passengers.

We submit that the rationale of *Parden* and the cases following it should apply, but with even greater vigor, on the issue of a county losing immunity which it only has by reason of state law, by choosing to enter into the business of operating an air-

port, and thus entering, in a proprietary capacity, the federally preempted sphere of interstate air commerce. It hardly seems reasonable that the parties intended the county to remain immune when its partner in the airport project here, the United States, had waived its immunity; and when (as discussed in this brief in Part 1-c) the county had purchased liability insurance with respect to its operation of this airport. In any event, only county funds and not state general revenues, are involved here. Thus the opinion of the Court by Justice Rehnquist in *Edelman v. Jordan*, 415 U.S. 651 (1974), is not inconsistent with the decision we urge here.

A Seventh Circuit case, *Kohr v. Allegheny Airlines, Inc.*, 504 F. 2d 400 (1974) *cert. denied*, 421 U.S. 978 (1975) is an important case bearing in part on the contentions of Part 1 of this Argument, that federal common law applies generally here. But we offer it specifically in connection with this Part 2 as authority for a federal court in an aviation case refusing to apply a particular substantive rule of the forum state because of the predominant federal interest.

An Allegheny DC9 collided in midair with a small plane owned by defendant Forth, and piloted by a student pilot, Carey, whose estate was also a defendant. The United States was a defendant pursuant to the Tort Claims Act (as in our case). The action was filed in diversity, and the district court for the Southern District of Indiana applied Indiana law on the issues of contribution and indemnity by Forth, Forth's parent corporation, and the Carey estate to Allegheny and to the United States. The district court found that Indiana law did not permit contribution or indemnity. The Court of appeals, noting in dictum that the district court seemed to be wrong in its construction of Indiana law in any event, held that a federal rule of contribution and indemnity should be imposed. We submit that a federal rule refusing to apply a state statutory immunity in our case ought

similarly to be imposed, on the principles explicated by the Seventh Circuit in *Kohr*, from which we quote at length:

> "The basis for imposing a federal law of contribution and indemnity is what we perceive to be the predominant, indeed almost exclusive, interest of the federal government in regulating the affairs of the nation's airways. Moreover, the imposition of a federal rule of contribution and indemnity serves a second purpose of eliminating inconsistency of result in similar collision occurrences as well as within the same occurrence due to the application of differing state laws on contribution and indemnity. Given the prevailing federal interest in uniform air law regulation, we deem it desirable that a federal rule of contribution and indemnity be applied."
>
> "That the federal interest in regulating airways is predominant was long ago recognized by Justice Jackson in Northwest Airlines v. Minnesota, 322 U.S. 292, 303, 64 S. Ct. 950, 956, 88 L. Ed. 1283 (1944):
>
> > 'Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, to United States v. Appalachian Power Co., 311 U.S. 377 [61 S. Ct. 291, 85 L. Ed. 243]. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.'
> >
> > 'Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the

(Still quoting from *Kohr*)

> hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and order. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.'

"With the passage of the Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq., Congress expressed the view that the control of aviation should rest exclusively in the hands of the federal government. In section 1108 of the Act, 49 U.S.C. § 1508(a), it is clearly provided that:

> '(a) The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.'

"The explicit objective of the Act is to foster the development of air commerce. 49 U.S.C. § 1346. To that end, it has been recognized that the principal purpose of the Act is to create one unified system of flight rules and to centralize in the Administrator of the Federal Aviation Administration the power to promulgate rules for the safe and efficient use of the country's airspace. United States

(Still quoting from *Kohr*)

> v. Christensen, 419 F. 2d 1401 (9th Cir. 1969); Air Line Pilots Association v. Quesada, 476 F. 2d 892 (2d Cir. 1960). When the notion of federal preemption over aviation is viewed in combination with the fact that this litigation ensues from a mid-air collision occurring in national airspace, that the Government is a party to the action pursuant to the Federal Tort Claims Act (28 U.S.C. § 1346(b) et seq.), and that this litigation has since its inception been subject to the supervision of the Judicial Panel created by the Multidistrict Litigation Act (28 U.S.C. § 1407 et seq.), there is no perceptible reason why federal law should not be applied to determine the rights and liabilities of the parties involved. The interest of the state wherein the fortuitous event of the collision occurred is slight as compared to the dominant federal interest. Accordingly, the rights and liabilities of Allegheny and the United States are peculiarly federal in nature and are to be governed by a federal rule of contribution and indemnity.[3]"

* * * * * * * *

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[3] In view of the aforementioned predominant federal interest in formulating a rule of contribution and indemnity we are of the view that the Federal Tort Claims Act is not an obstacle to the application of such a rule to the United States' claims. In addition we find no merit in defendents' argument that Allegheny and the United States are estopped to assert the invalidity of the dismissal of their cross-claims and third-party complaints.

Our case is not identical to *Kohr* —we do not have as many deaths; and the nexus of Georgia to the tranaction is admittedly greater than Indiana's was in *Kohr*. But on the other hand, we submit, a state law rule of immunity more deeply offends the purpose of the federal aviation regulatory system than state law rules concerning indemnity and contribution do. Immunity seriously undercuts the federal policies here, and a federal law rule denying immunity ought to be applied. Again we note, as stated before, that the County's immunity here is purely a state

law rule not protected by the Eleventh Amendment as might be the case if the State of Georgia itself was the defendant in question. As Mr. Justice Brennan said in closing his dissent in *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973), at 411 U.S. 323, "In short, the trend . . . has been against enforcement of governmental immunity except when clearly required by explicit textual prohibitions, as in the Eleventh Amendment. Moreover, as Parden illustrates, the trend also is to interpret those prohibitions narrowly and literally."

3. **An Implied Civil Remedy Exists Under the Federal Aviation Acts for Death or Injury Caused by Flagrant Breach of Federal Safety Standards.**

The District of Connecticut, in *Town of Easthaven v. Eastern Airlines, Inc.*, 282 F. Supp. 507 (1968) held that "it is clear that a violation of the provisions of the Federal Aviation Act or the regulations or rules issued pursuant thereto may give rise to a private federal right of action maintainable by those injured by the violation."

Then in 1972 a Federal District Court in California, in *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Calif. 1972) similarly found an implied private right of action under the federal aviation acts to create "a cause of action in favor of one who is injured or damaged by the death of a person resulting from such violation . . ." (350 F. Supp. at 615).

And recently in *In Re Paris Air Crash*, 399 F. Supp. 732 (C.D. Calif. 1975) that court again so held, setting forth at p. 748 the rationale in some detail:

> "Recently the Supreme Court set forth the factors which are relevant in determining whether a private remedy is implicit in a statute not expressly providing one. *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed 2d 26, decided June 17, 1975, sets them forth on page 78, 95 S. Ct. on page 2087 of the opinion:

(Still quoting from *In Re Paris*)

> "First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted . . .?' It is obvious from the discussion in the *Gabel* case that the overwhelming interest of the legislation is in safety. If the safety is not that of the passengers, then the Act has no meaning at all; and the first place to begin on safety is in the design and manufacture of aircraft."
>
> "Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? The legislative history shows the purpose of creating the Federal Aviation Administration was to avoid the division of responsibility which had arisen under previous legislation, to unify agencies for 'Air-Safety Legislation,' and to give the new administrator power to, among other things, '[m]ake and enforce safety regulations governing the design and operation of civil aircraft.' (italics added) Pub. L. 85-726, 1958 U.S. Code Cong. & Admin. News, p. 3741 *et seq.*"
>
> "Third, is it consistent with the underlying purposes of the legislative scheme to employ such a remedy for the plaintiff? This can also be answered affirmatively under the same discussion as for the previous question. As a general rule, when legislation provides a particular remedy or remedies, courts should not expand coverage to subsume other remedies, but even the most basic principles of statutory construction must yield to clear contrary evidence of legislative intent. *Passenger Corp. v. Passengers Assn.*, 414 U.S. 453, 458, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974). Clear intent on the part of Congress to provide against the improper design and manufacture of aircraft is found in the Federal Aviation Act, 49 U.S.C. § 1406, which says, *inter alia*: '[T]he provisions of this chapter are in addition to such remedies' of the states. Where conduct was torti-

(Still quoting from *In Re Paris*)

> ous, it was held that a private remedy would lie for persons on whose behalf a regulation was made. [citations omitted]"
>
> "Finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law? The converse, of course, is true since the federal regulation of aviation is so pervasive as to preempt state attempts at any such regulation. *City of Burbank v. Lockheed Air Terminal, Inc., supra.*"

We submit that *Town of Easthaven, Gabel,* and *In Re Paris Air Crash* should be adopted; and that a private action for personal injury or death as a result of violation of the safety provisions of the Aviation Act, or a grant agreement entered into pursuant thereto, should be recognized.

If the Court should find such a private action, the Fifth Circuit opinion in *Rogers v. Ray Gardner Flying Service, Inc.*, 435 F. 2d 1389 (5th Cir. 1970, reh. denied), cert. den. 401 U.S. 1010, which declined to find such an implied civil action, would be distinguished, as it was by the district court in *Gabel*, as a holding that there was no intent in the federal aviation statutes to override the state law of bailments and to create a wholly vicarious liability of a defendant who was without fault.

The recent opinion of the Third Circuit in *Rauch v. United Instruments Inc.* (12/30/75), 44 L.W. 2333 is also distinguishable and in fact that opinion takes pains to show clearly that it is not suggesting that such a remedy should not exist on the sort of facts we have here. *Rauch* itself was a weak case on the facts. Aircraft owners there sought to use a federal right of action to sue the manufacturer and distributors of altimeters which did not meet federal standards. The plaintiff aircraft owners had incurred money costs in connection with replacing the altimeters.

The Court of Appeals tested the Rauch claim for existence of a private remedy by the four tests established by this Court in *Cort v. Ash*, 422 U.S. 66 (1975). The Rauch claim was found to pass at least two of the tests of *Cort*, but to fail the second—that the plaintiffs be members of the class for whose special benefit the statute was enacted—and the fourth—whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a federal cause of action. *Rauch* fails the special benefit test because the actual class to be protected is those whose death or injury is caused by safety violations (such as the *Miree* petitioners). *Rauch* also fails the fourth test, according to the Third Circuit, because the traditional state remedies of breach of warranty of merchantability and fitness, and of negligence, and of strict liability for tort are all available to seek redress for costs incurred in replacing altimeters.

That the case at bar, *Miree*, passes the second *Cort* test—membership in the class to be protected—is clear beyond argument. *Miree* also passes that fourth test of *Cort v. Ash* which *Rauch* failed. The proof that an adequate traditional state law remedy is not available is that the claims made in the *Miree* complaint based on negligence, nuisance, strict liability, existence of insurance, and third-party rights under the FAA-DeKalb County grant agreement *were all denied* by the Fifth Circuit purporting to apply state law. The record of this lawsuit bespeaks more eloquently than argument that state law does not offer an adequate remedy for damages for death or injury of interstate passengers in civil aviation. The respondent DeKalb County argued in its Response to Petitioners for Certiorari here, at p. 10, that even if petitioners were to prevail on the third-party beneficiary issue, it would be a hollow victory, as our remedies would not exceed the rights of the contracting parties themselves, and would furnish no basis for the present actions. The issue is perhaps even more pointed in the *Miree* case than the other cases consolidated herewith, as the Miree children sue

through their guardians, and must show the existence of a remedy which survived the death of their father and mother; or a remedy which inheres directly in them. The argument made by Respondent, referred to above, proves that state law does not offer an adequate remedy to these petitioners.

We clearly meet all the *Cort* tests. Interstate civil aviation passengers (and their surviving children when their parents are killed) are clearly members of the class for whose special benefit the safety provision of the federal aviation laws and regulations, and the provisions of the grant agreement here, were drafted. The statutory reference is 49 U.S.C. § 1718:

* * * * * * *

> (3) The aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.
>
> COMPATIBLE USE OF ADJACENT LAND
>
> (4) approriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and take-off of aircraft.

It was, of course, the operation of the County-owned open garbage dump next to the runway of the County-owned airport, which attracted the flock of birds which was a flight hazard known to the respondent County, and which caused this tragic crash. As to whether there is indication of legislative intent either to create or to deny a civil remedy, the excellent lengthy Note in 51 N.Y.U.L. Rev. 231 (May, 1976) mentioned in the *Miree* Petition for Certiorari at p. 20 considers the legislative indications on this issue in great detail (pp. 248-252) and found

an implied cause of action to be consistent with the legislative intent of the Federal Aviation Act (51 N.Y.U.L. Rev. at 252).

We have discussed *Cort's* fourth, first, and second test. The third is whether a civil remedy would be consistent with the statutory scheme. What has been said above, we submit, effectively answers this question as well. The main thrust of the statutory scheme is to create and encourage high standards of safety. The statute's requirement that runway hazards be mitigated (49 U.S.C. § 1718(3)), and that adjacent land not be used for a purpose incompatible with take-off and landing of aircraft (49 U.S.C. § 1718(4)) could hardly be better served than by imposing liability on an airport "Sponsor" which directly causes deaths by its flagrant, continued violations of those requirements, after repeated requests from the F.A.A. to mitigate the hazard, on adjacent land which the "Sponsor" County itself owned.

The author of the N.Y.U. Law Review note reached the conclusion that a federal cause of action ought to be recognized even without reference to, and apparently without special consideration of the extreme need for such a remedy when a culpable defendant asserts immunity under state law. The addition, in our case, of that factor, compels that the purpose of the federal regulatory system of interstate civil aviation be implemented by the recognition of a federal right of action to persons injured, and a wrongful death action to survivors of persons killed, as the direct result of violation of the federal laws and regulations governing aviation. With specific reference to the wrongful death action, we would ask the Court to find such an action here, as it did in ***Morange v. State Marine Lines, Inc.***, 398 U.S. 375 (1970), there not in aviation but under "general maritime law," in line with what the Court described as "the general rule of American law." 398 U.S. at 393.

In order to keep this brief within acceptable length, we adopt the above-mentioned N.Y.U. Note, "The Case for a federal

Common Law of Aircraft Disaster Litigation: A Judicial Solution to a National Problem," 51 N.Y.U.L. Rev. 231 (May, 1976), as it treats in detail the reasons which compel recognition of a federal remedy on the strong facts of the case at bar.

4. **A United States District Court, sitting in Diversity, Must Grant Standing to Sue to Parties Who Have Such Standing, as Contract Third-Party Beneficiaries, Under Applicable State Law.**

Doubtless in an ordinary diversity case the federal district court should apply the third-party beneficiary rule of the forum state. There are several factors which distinguish our case from such an ordinary case: (a) we also asserted federal question jurisdiction under the federal aviation acts; (b) the contract under which we sought to sue as intended third-party beneficiaries was a contract to which the United States was a party; (c) the United States is a defendant in the case, pursuant to the Tort Claims Act; (d) the contract was a federal airport grant agreement, treating an area of interstate commerce preempted by federal regulation; (e) petitioners' decedents were interstate air passengers; and (f) they were killed as the direct result of the flagrant violation, by the defendant County, of federal regulatory safety standards imposed upon that defendant by federal regulations specifically to avert this precise type of tragedy.

These six factors add up, we submit, to a powerful rationale for application of a federal rule of law to permit this action against the County. Parts 1, 2, and 3 of this brief argue three methods by which a federal rule can and should reach that result.

In this Part 4 we argue, alternatively, for the rationale of the majority opinion of January 30, 1976, of the panel of Court of Appeals, by Judge Morgan. (A.P.C.-16). He found that the substantive law of Georgia, where he had previously served as a United States District Judge, permitted petitioners' standing to

sue DeKalb County, in contract, notwithstanding the general state-law rule of county immunity. He found that Georgia courts recognize a contract exception, and specifically a third-party beneficiary exception, to the immunity rule and that petitioners could sue pursuant to that rule. At (A.P.C.-23) *et seq.* Judge Morgan's panel opinion shows in detail that if a Georgia statute authorizes a county to contract, an action for its breach is also created; and that under Georgia law (Ga. Code Ann. § 3-108) ". . . the beneficiary of a contract made between other parties for his benefit may maintain an action against the promissor on such contract." Then reviewing the facts alleged in the complaint, and the appropriate provisions in the grant agreement, Judge Morgan found it to be clear that the contract was intended for the benefit of the public, and that petitioners could sue the County, as a matter of state law.

Judge Dyer's dissent from the panel opinion (A.P.C.-27) contended that because of the strong federal interests involved, and the fact that the United States is a party to the contract in question, a federal common law test ought to apply on the issue of third-party beneficiary standing. He argued that federal common law, adopting the old rule of Restatement (First) of Contracts, § 145 (1932) permits third-party beneficiary actions only when the contract in question evidences not only a specific intent to benefit the plaintiff but also manifests a specific intent to compensate the plaintiff for injury in the event of its breach.

Judge Dyer found a sufficiently powerful federal interest here to warrant application of a federal common law rule of contract construction to defeat petitioners' *Erie* right to a state law third-party beneficiary remedy. Yet at the same time, he refused to consider that the federal interest justified a finding that the state law rule of immunity ought also to give way, or that the County waived its immunity by entering the federal sphere of interstate air commerce, or that a federal remedy for damages under the federal aviation acts ought to be permitted.

The Court of Appeals, after rehearing en banc, adopted *per curiam* this dissent of Judge Dyer's as the opinion of the Court. *In effect, the Court found just enough federal interest to justify depriving petitioners of their state law contract remedy, but not enough to give petitioners a federal remedy.* Eight members of the Court joined in that *per curiam* opinion. Five, including the Chief Judge, who also wrote separately, dissented, in an opinion by Judge Morgan.

Petitioners find the *per curiam* result to be cruel and ironic in its misapplication of principles of federalism. We have shown above in Part I of this brief that Judge Dyer is clearly wrong in finding federal common law on the third-party beneficiary issue to be so restrictive; we have shown that the cases he cites not only are not persuasive authority but that several of them simply do not stand for what Judge Dyer says they do (this brief, at Part 1-B). But leaving aside here the question of whether there is or is not a federal common law third-party beneficiary rule more restrictive than Georgia's, the frustration here comes from such a rule having been applied in the name of the "necessity for uniformity of decision" as Judge Dyer says (A.P.C.-27). How can uniformity of decision possibly be advanced by Judge Dyer's result, adopted *per curiam* by the en banc majority, which denies a remedy to survivors of persons killed at *this one airport*, which happened to be operated by a Georgia *county*, when concededly they could sue in tort if they had been killed at the Atlanta-Hartsfield airport, just a few miles away, where the FAA grant agreement was with a *municipality* rather than a county? And looking beyond Georgia, how does it promote uniformity to create a federal path to immunity for this one airport when the vast majority of airports throughout the nation, with which the FAA has grant agreements, have no immunity because of state law absence or abrogation of the doctrine with respect to the various municipalities, special authorities, and other jurisdictions and entities which have contracted with the FAA?[3]

[3] See material reported at footnote 1, *supra*.

And turning from the federal "necessity for uniformity of decision" which Judge Dyer claimed to have been promoting, what about the federal policy of promoting safety in air commerce? The Court below absolutely failed to advert to what the real overriding purpose of federal regulation of civil aviation is, *viz, safety in air commerce*. Once safety is recognized as the prime federal interest, as is hardly debatable, Judge Dyer's tortious rejection of state law in the name of federal interests, while he simultaneously constructs, on poor authority, a federal rule which denies a remedy for deaths caused by violations of federal safety standards, becomes patently circular reasoning. The federal interest is ill served by creating a shield of federal law to protect a county, operating an airport under a federal grant agreement, from liability for its own gross fault, when its own state law would not so shield it.

We submit that a proper result in this case, and perhaps the only proper result, would be to permit these diversity petitioners the use of whatever remedy they might have as a matter of state law (here, the third-party beneficiary remedy) *in addition* to such remedies as they may have as a result of application of federal law as argued in Parts 1, 2, and 3 of this brief.

There is a sub-issue of importance if the Court should determine that the state law rule on third-party beneficiary standing is the law to be applied. In such event we must ask the Court here, in order to achieve full relief, to adopt the finding of the majority panel opinion below that plaintiffs were as a matter of law, under their Complaint, and the grant agreement, *intended* beneficiaries of the contract. The reason we must ask this Court to consider this sub-issue is that in a footnote to his panel dissent, Judge Dyer noted his disagreement with that conclusion of the panel majority, and stated, in footnote (A.P.C.-27) that

> "Even if Georgia law should apply, the result would not be different. The majority recognizes that under Georgia law, only *intended*, and not *incidental* beneficiaries may recover

for breach of contract. As will be shown in this dissent, nothing in the grant agreements or the underlying statutes raises the status of the plaintiffs from incidental to intended beneficiaries."

Judge Dyer states (at A.P.C.-29) that the "broad assurances" made by the County are "nothing more than the assurances required by 49 U.S.C.A. § 1110." Whatever their genesis is, however, we submit that he is wrong in concluding that as a matter of law the petitioners are merely "incidental" beneficiaries, in view of the following language in the grant agreement, as pleaded in petitioners' Complaint: (A. 36)

> "1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof made by the FAA and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.
>
> 2. *The Sponsor will operate the Airport as such for the use and benefit of the public* . . . That Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the *safe operation* of the airport or necessary *to serve the civil aviation needs of the public.*
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> * * * * * * *
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> 6. The Sponsor will operate and maintain in a *safe* and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the *aeronautical users* of the Airport other than facilities owned or controlled by the United States, and *will not permit any activity thereon which would interfere with its use for airport purposes* . . .

> 13. Insofar as it is within its power and to the extent reasonable, the *Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.*" (Emphasis added).

Notwithstanding this language, Judge Dyer's panel dissent concluded, as a matter of law, that petitioners' complaint was due to be dismissed, as they were clearly only "incidental" beneficiaries.

When the en banc Court of Appeals issued its opinion *per curiam*, it merely adopted Judge Dyer's dissent, and did not write separately; and in doing so it adopted (we believe inadvertently) this dictum to the effect that petitioners were in any event only "incidental" beneficiaries. The en banc dissent of five judges, written by Judge Morgan, states at its conclusion, (A.P.C.-13): "Under our interpretation of Georgia law, the law which we believe to be applicable here, plaintiffs could sue as third-party beneficiaries to the grant agreement between the United States and DeKalb County." We submit that Judge Morgan, the only member of the Court of Appeals who actually addressed himself to that issue, is clearly correct. Judge Dyer's opinion, adopted *per curiam* by the en banc Court of Appeals, seems clearly to concede that the Georgia rule is what Judge Morgan in his two opinions says it is. The dispute is rather whether the language in the grant agreement ("for the use and benefit of the public . . ."; ". . . safe operation . . . to serve the civil aviation needs of the public"; and ". . . to serve the aeronautical users of the Airport . . .") can possibly be said, as a matter of law, to make the petitioners, or their decedents, only incidental beneficiaries. Inasmuch as the appeal in this case was from a ruling of the district court granting one motion of the County to dismiss, we are entitled to a reversal unless as a matter of law that quoted language from the grant agreement

can be said not to intend the petitioners as beneficiaries of the contract.

Thus if the Court here should rule upon the issue raised by this Part 4, we ask that the Court hold that as a matter of law such language *does* give petitioners the status of intended beneficiaries; or alternatively to hold that petitioners are entitled to try this issue as a question of fact.

CLOSING STATEMENT

We submit that we have demonstrated how the Court of Appeals has picked and chosen pieces of state law and pieces of federal law to reach its result with no overall consideration either to policy and effect or to the fundamental issues implicit in the case.

Why is it that federal common law must apply to construe third-party rights under the contract here and thus deprive us of the one available state remedy, and at the same time a state law rule of tort immunity be given its full *Erie* force? Why was federal common law on third-party rights deemed to have been frozen at the date of the Restatement (First) of Contracts, (1932)? Why should the rights of interstate air passengers depend entirely upon whether they land at the Atlanta Municipal airport (which does not have immunity) or at this nearby airport, which claims to? Why should the County purchase insurance for airport liability and yet the dead or injured users of the airport get nothing, directly or indirectly, as a result of such insurance?

This case involves fundamental issues of federalism which have been applied below in a distorted and shortsighted manner to yield a harsh result. We have offered the Court here four rationales, each of which is consistent with basic principles and with the prior decisions of this Court and other courts, to permit an action for the deaths of petitioners' parents.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals below should be reversed, and the motion of respondent DeKalb County, Georgia to dismiss petitioners' complaint against it should be denied.

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Certificate of Service

I hereby certify that three copies of the foregoing Brief have this date been served by mail upon all parties represented in this proceeding this 28th day of February, 1977.

Alan W. Heldman